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Supreme Court, U.S.
FILED
AUG 26 1996
CLERK

No. 96- ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA.

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF OHIO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OKLAHOMA, SOUTH DAKOTA, VERMONT AND THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF PETITIONER, CITY OF BOERNE, TEXAS

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QUESTION PRESENTED

DOES THE RELIGIOUS FREEDOM RESTORATION ACT EXCEED CONGRESSIONAL AUTHORITY UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT?

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STATEMENT OF AMICUS INTEREST

Amicus State of Ohio and 15 other amici States write to urge the Court to grant certiorari in this case to address a federal question of great magnitude to the States and to resolve a conflict of authority among the lower courts that is growing day by day.

At issue in this matter, as well as in cases in several other federal circuits, is the constitutionality of The Religious Freedom Restoration Act ("RFRA" or the "Act"), 42 U.S.C. §§ 2000bb *et seq.* *See* Appendix Item A, Table of Cases involving RFRA. Enacted in 1993, RFRA was designed to "overrule" *Employment Division v. Smith*, 494 U.S. 872 (1990), and to "restore" the strict scrutiny test applicable to claims arising under the Free Exercise Clause of the First Amendment to the United States Constitution.

The status of RFRA is an important issue to the States for one essential reason: The law has dramatically increased the volume of inmate litigation and in the process has created unique burdens for prison administrators, State Attorneys General and other State officials.

Running a safe, secure, and orderly prison system is one of the most difficult tasks consigned to State governments. RFRA exacerbates the challenges of this task by creating new security threats posed by inmate gangs and by racially divisive activities within prisons. It does so by frequently allowing gangs and like-minded groups to shroud illicit activity under the cover of "religious" belief. Even though many claims now confronting State prison officials would not have met the requirements of Rule 11 under prior law, they now are being litigated anew in every corner of the country. Aside from the litigation expense itself caused by these lawsuits, this development requires corrections officials

to divert extensive amounts of staff time to investigate the "religious" nature of the groups and the "religious" necessity of specific activities engaged in by those groups. Making matters worse is the restoration of the "least restrictive means" test, which regularly compels corrections staff to develop ways to accommodate these disruptive activities. *See* Appendix Item B, letter of Kim Tucker; Appendix Item C, letter of Reverends Karlen and Schwarz.[1]

The second problem created by RFRA is the massive diversion of resources caused by this litigation wave and by inmate demands for special accommodations. A LEXIS/NEXIS search conducted during the week of July 15, 1996 revealed that no less than 288 cases involving RFRA have been decided by state and federal courts in the less than three years since its enactment.[2] Of these cases, 155 involved prisoners. And over a dozen of these cases were brought as class actions.

In addition to the increase in the volume of cases filed under the new law, corrections officials must deal with the fact that these cases are harder to dispose of than most due to the courts' understandable difficulty in deciding what accommodations are truly necessary for the proper exercise of a given religion. The litigation thus requires prison officials to divert staff from normal duties in order to attend depositions, give testimony, supply affidavits and the like. It also multiplies the case load of the State Attorneys General

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[1] All references to items included in the Appendix to this brief will be made to "App. Item."

[2] These results were obtained by searching the term "religious freedom restoration" in the "mega" library and "mega" file of LEXIS/NEXIS and then modifying the search to include the terms "inmate" or "prisoner."

responsible for representing State prison wardens. This diversion of resources is particularly frustrating to the States since most of the issues now being litigated were previously resolved favorably to the States under the "reasonableness" test established in *O'Lone v. Estate Of Shabazz*, 482 U.S. 342 (1987).

Perhaps most frustrating of all, RFRA has undermined the very goal it was meant to advance -- sensitivity to the religious beliefs of prison inmates. The increase in litigation and internal demands for accommodations divert chaplains and other religious services personnel from their core mission of facilitating and delivering religious services to prisoners. Preliminary results from a national survey indicate that the increased demands for time and space for activities by such previously obscure religions as Satanism, Wicca and Asatru have resulted in less time and space being made available to more numerous Christian and Islamic inmates. That survey also indicates that increased conflict with more militant inmates has resulted in less volunteer religious programming being made available by outside providers. Some prison systems have become so frustrated with the impact of RFRA that they have discontinued all state-supported religious programming. *See* Appendix Items B and C.

REASONS FOR GRANTING THE WRIT

A. There Is A Growing Conflict Of Authority Among The Lower Courts On The Constitutionality Of RFRA.

The first reason for granting the writ is the current -- and burgeoning -- lower court conflict on the issue. While just two federal courts of appeals have weighed in on whether RFRA is unconstitutional as applied to the States,

several lower courts have already done so. All told, two lower courts have held the Act unconstitutional. *See Cardinal William H. Keeler v. Mayor & City Council of Cumberland*, 1996 U.S. Dist. LEXIS 8090 (D. Md. 1996); *In re Tessier*, 190 B.R. 296 (Bankr. D. Mont. 1995). And four lower courts have held the Act constitutional. *See Flores*; *Sasnett v. Sullivan*, No. 95-3924, 1996 U.S. App. LEXIS 19203 (7th Cir. 1996); *Belgard v. Hawaii*, 883 F. Supp. 510 (D. Haw. 1995); *Gallo v. Salesian Society, Inc.*, 676 A.2d 580 (N.J. Super. Ct. App. Div. 1996)..

In addition to these cases from the Fourth, Fifth, Seventh and Ninth Circuit Courts of Appeals and from one state court, the constitutionality of RFRA has been called into question in a number of federal district and state courts (see Appendix Item A), including a recent challenge made by the State of Ohio in federal court in *Syder v. Voinovich*, No. C2-94-536 (S.D. Ohio August 7, 1996). The volume of cases in which RFRA's validity has been called into question make clear that the validity of this law is ripe for review by the Court.

B. The Validity Of RFRA Raises An Exceedingly Important Federal Question For The States.

The unconstitutionality of RFRA also presents a federal question of great importance to the States. Even though RFRA has been on the books for less than three years, it has generated an enormous amount of litigation. As noted above, no less than 288 cases have already relied on the Act and in many of these cases RFRA's validity has been questioned. *See* Appendix Item A.

Most notably, the passage of RFRA has had a disruptive effect on the ability of the states to exercise their

sovereign power in the fulfillment of one of their most difficult responsibilities -- the operation of State prisons. As the Court noted in *Bell v. Wolfish*, 441 U.S. 520 (1974):

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security ... *such considerations are peculiarly within the province and professional expertise of corrections officials*

Id. at 547 (emphasis added) (citations and internal punctuation omitted).

Just this Term, the Court reiterated the disruptive effect that strict scrutiny would have on prison operations:

> We held in *Turner v. Safley*, 482 U.S. 78 (1987), that a prison regulation impinging on inmates' constitutional rights "is valid if it is reasonably related to legitimate penological interests." *Id.*, at 89. Such a deferential standard is necessary, we explained,
>
> "if 'prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations.' *Subjecting the day-to-day judgments of prison officials to an inflexible strict-scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of*

> *prison administration." Ibid.* (citation omitted), quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977).
>
> These are the same concerns that led us to encourage "local experimentation"....

Lewis v. Casey, 116 S. Ct. 2174, 2185 (1996) (emphasis added).

In the end, it is difficult to overstate the impact that RFRA has had on the States' administration of their prisons. This fact alone provides a compelling reason for reviewing now (rather than later) the question whether Congress has exceeded its authority in this delicate area of State-federal relations.

C. The Lower Court Erred In Concluding That Congress Did Not Exceed Its Authority In Enacting RFRA.

Employment Division v. Smith, 494 U.S. 872 (1990), held that facially neutral and generally applicable laws, which only incidentally infringe religious practices, do not violate the Free Exercise Clause. In doing so, *Smith* determined that strict scrutiny does not apply to such claims and that such a test in any event is unworkable in this setting. Unhappy with the *Smith* decision, Congress simply tried to overrule it. As explicitly acknowledged in the statute itself, *see* 42 U.S.C. §§ 2000bb(a)(4-5), (b)(1), Congress created RFRA in order to "restore" the strict scrutiny standard invalidated in *Smith*. Any power that Congress has under section 5 to enforce the Fourteenth Amendment, however, simply does not go that far -- to an Act that does not address a specific legislative problem but attempts to erect a standard of review for courts assessing future legislation, to an Act that does not remedy

a constitutional wrong but attempts to create a constitutional right, and to an Act that at bottom circumvents the constitutional route -- amendment or overruling -- for addressing unfavorable Supreme Court decisions. Neither Congress's "enforcement" authority nor its "remedial" authority under section 5, *see South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), and *City of Rome v. United States*, 446 U.S. 156, 177 n.12 (1980), supports the passage of RFRA.

1. RFRA Exceeds Congress's Limited "Enforcement" Authority Under Section 5.

As a matter of plain meaning and common sense, there is no plausible argument that RFRA was enacted to "enforce" the 14th Amendment, specifically the now-incorporated Free Exercise Clause of the First Amendment. According to *Smith*, the Free Exercise Clause means that generally applicable, facially neutral laws do not receive strict scrutiny. But, according to Congress's efforts to enforce that provision, RFRA now requires strict scrutiny for such claims. Far from enforcing the Bill of Rights in this instance, Congress simply has tried to change its meaning. Under these circumstances, Respondent cannot tenably argue that RFRA in any way "enforces" the Free Exercise Clause.

2. RFRA Exceeds Congress's Limited "Remedial" Authority Under Section 5.

No less helpful is the so-called "remedial" theory of section 5 power. *First*, to the States' knowledge, the United States Supreme Court has just approved this discrete theory of section 5 power in the core Fourteenth Amendment areas of race and voting rights. For example, in the three leading

cases, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980), the Court recognized that Congress had a limited remedial power to eradicate conduct found to perpetuate racial discrimination relative to voting, *South Carolina*, 383 U.S. at 324; *Morgan*, 384 U.S. at 650; and to guard against future racial discrimination relative to voting, *City of Rome*, 446 U.S. at 177. *But see Hutto v. Finney*, 437 U.S. 678, 698 n. 31 (1978) (indicating in *dicta* that § 5 applies to incorporated rights.)

Even in the areas of race and voting, moreover, section 5 is not a writ large that gives Congress unlimited authority to regulate state conduct. As the Court reminded Congress in *Oregon v. Mitchell*, 400 U.S. 112 (1970), there are important limitations on this power. *Mitchell* dealt with legislation that, among other things, attempted to lower the voting age to eighteen in all federal and state elections. Yet, even though the legislation dealt with the core Fourteenth Amendment value of voting rights, the Court ruled that Congress could not impose such a requirement on the States. *Id.* at 130 (Black, J., announcing judgment of Court). *See also Id.* at 212-13 (Harlan, J., concurring in part).

At all events, whatever the permutations of section 5 with respect to race and voting, RFRA is the easy case. It does not even pretend to deal with race or voting rights, the core values protected by the Civil War Amendments. The only "evil" Congress attempted to "root out" is the Supreme Court's decision in *Smith*, which concerns "free exercise" rights. And the only "remedy" RFRA provides is Congress's own interpretation of the free exercise clause. No precedent supports this exercise of section 5 power -- whether brought in the name of an "enforcement" or "remedial" theory.

Second, in each of the few cases upholding Congress's exercise of section 5 power, the legislature identified a specific area of State legislation that undermined the goals of the Fourteenth Amendment and sought to eradicate these specific types of state law practices. But in none of these cases did Congress simply prescribe a *standard of review* for courts to use in assessing all future individual claims that the government had trampled on a Bill of Rights' guarantee. In this respect, RFRA differs from every section 5 case before it. It is purely definitional in nature, which is precisely the conclusion that Judge McMillian of the Eighth Circuit properly reached in explaining why RFRA is unconstitutional.

> Through RFRA's passage, Congress did not attempt to root out a particular evil, such as literacy tests, which were often means for perpetuating racial discrimination, but simply expressed the normative judgment that "governments should not substantially burden religious exercise without compelling justification." 42 U.S.C. § 2000bb(a)(3). *This is the role given to the Supreme Court, not Congress, by the Constitution.*
>
> *RFRA is neither remedial nor supplemental, but definitional. Morgan* upheld a law which, as the Court indicated, Congress might have rationally concluded would either remedy past invidious discrimination or prevent future discriminatory conduct. In RFRA, however, Congress establishes a rejected method of analysis of all free exercise claims simply because Congress interprets the Free Exercise Clause differently than the Supreme Court. *This is not prophylaxis but unconstitutional*

> *interbranch hegemony.* ... Consequently, I would hold that the enactment of RFRA was not a valid exercise of § 5 power. To hold otherwise would be inconsistent with the essence of judicial review and the separation of powers. ... Section 5 grants Congress the power to supplement, not subvert, the Supreme Court's underlying constitutional jurisprudence.

Hamilton v. Schriro, 74 F.3d 1545, 1570 (8th Cir. 1996) (McMillian, J., dissenting in part) (emphasis added). (Other members of the *Hamilton* panel did not reach the constitutional question.)

In weighing the competing interests involved in *Smith* and in determining what the Bill of Rights requires, the United States Supreme Court was carrying out its quintessential function as the "ultimate interpreter of the constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *United States v. Nixon*, 418 U.S. 683, 705 (1974). Nor can there be any legitimate doubt that the essential -- and intended -- consequence of RFRA is legislatively to reweigh those constitutional interests in cases involving the "exercise of religion" as that term is used "under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4).

Such a legislative trespass into the judicial sphere is neither warranted nor proper. Congress may not exceed "its authority by requiring the federal courts to exercise 'the judicial Power of the United States,' U.S. Const., Art. III, § 1, in a manner repugnant to the text, structure and traditions of Article III." *Plaut v. Spendthrift Farms, Inc.*,

115 S. Ct. 1447, 1452 (1995). *See also Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 851 (1986). Here, however, the Act does precisely that. It defines the proper standard of review for all courts to apply in assessing claims involving the "exercise of religion" as that term is used "under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4).

The specific separation of powers problem created by RFRA, then, is not that Congress has considered the meaning of a provision of the Bill of Rights. Congress presumably does that all the time in determining whether proposed legislation is constitutional. Rather, the problem is that the legislature has gone a step further. It has not only made an independent interpretation of what the Constitution means, but it has also seen fit to make that interpretation binding on all courts faced with future free exercise claims by announcing the appropriate standard of review for all claims involving the "exercise of religion" as that term is used "under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4). To the States' knowledge, in fact, Congress has never before changed the Court's interpretation of a Bill of Rights provision in this way by redefining, for all future cases involving that right, the relationship between the individual right asserted and the countervailing power of government.[3]

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[3] For these reasons, RFRA also represents an end run around the normal process for altering Supreme Court interpretations of the Constitution -- the amendment process. Under Article 5, the Constitution may only be amended through a two-thirds vote of each House and approval of three-fourths of the States. As Justice Harlan indicated in *Oregon v. Mitchell*, permitting Congress to use its section 5 powers to reverse Supreme Court decisions offends that requirement:

Third, even aside from RFRA's failure to remedy voting rights or race violations and even aside from its failure to root out a specific type of state law or practice, the statute contains another constitutional flaw. It does not even pretend to exercise the kind of congressional power that section 5 contemplates. Notwithstanding the act's "findings," RFRA contains no indicia that Congress employed its "specially informed legislative competence" from which the Court might discern the "predicate" for Congress's "judgment" in this area. *Morgan*, 384 U.S. at 656. For example, there is no finding that the country is having problems with neutral state laws impinging on the religious freedom of citizens. Nor does the specific fact pattern at issue in *Smith* -- Native American use of peyote as a religious practice -- even begin to justify the far-reaching legislation that Congress passed. To prove the point, consider the Court's reaction if Congress in the 1960's had exercised its section 5 power in the same way that RFRA

> In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. *To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure.*

400 U.S. at 205 (Harlan, J., concurring in part and dissenting in part) (emphasis added). Far from respecting this prescribed route for changing the meaning of the Constitution, Congress has simply devised a mechanism for circumventing it. That bodes ill for the Free Exercise Clause, as well as for other protections of the Bill of Rights. It also completely eliminates any meaningful role the States were intended to have in altering the Constitution.

does with respect to voting rights matters. Instead of passing the Voting Rights Act of 1965, which targeted specific voting rights problems and specific voting rights practices, Congress would have passed a law that dictated to federal courts the appropriate standard of review for all voting rights challenges -- for example, holding that they all receive strict scrutiny even if no intentional discrimination is shown. It is unfathomable that even *South Carolina* and *Morgan* would have permitted such a trespass on the judicial branch. *See Mitchell*, 400 U.S. at 204-05 (Harlan, J., dissenting); *id.* at 128, 130 (Black, J., writing for the court); *id.* at 142-43 (Douglas, J., concurring in part, dissenting in part); and *id.* at 293, 295-96 (Stewart, J., concurring in part, dissenting in part).

In the end, the only "judgment" Congress exercised in passing RFRA was its disagreement with *Smith*. Such "findings," or more precisely the lack thereof, would not support legislation related to race and voting rights, let alone legislation having to do with religion. *Morgan*, 384 U.S. at 653. Deference thus is only appropriate in an area in which Congress is competent to act, which simply does not include the appropriate standard of review for assessing free exercise claims. *Oregon v. Mitchell*, 400 U.S. at 204-209 (Harlan, J., dissenting). Ultimately, Congress cannot justify RFRA on any remedial theory of section 5 power because there is no known constitutional wrong that the statute attempts to fix and no recognized congressional competence that the statute attempts to exercise.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request the Court to grant the petition for certiorari.

Respectfully submitted,

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APPENDIX ITEM A

TABLE OF CASES INVOLVING THE RELIGIOUS FREEDOM RESTORATION ACT

Cases Deciding the Constitutional Issue

Found Constitutional

Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996)

EEOC v. Catholic University of America, Nos. 94-5263 & 94-5283, 1996 U.S. App. LEXIS 11205 (D.C. Cir. 1996)[1]

Abordo v. Hawaii, 902 F. Supp. 1220 and *Belgard v. Hawaii*, 883 F. Supp. 510 (D. Haw. 1995)

State v. Miller, 538 N.W.2d 575 and *Sasnett v. Wisconsin Dept. of Corrections*, 891 F. Supp. 1305 (Wis. 1995)

Waahid Muslim v. Frame, 891 F. Supp. 226 (E.D. Pa. 1995) (Murphy, P.J., concurring) (dicta)

Gallo v. Salesian Society, Inc., 676 A.2d 580 (N.J. Super. Ct. App. Div. 1996); *South Jersey Catholic School Teachers Assn. v. St. Theresa*, 675 A.2d 1155 (N.J. Super Ct. App. Div. 1996); and *Ryslik v. Krass*, 652 A.2d 767 (N.J. Super. Ct. App. Div. 1995)

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[1] Found Constitutional as applied to the federal government.

Found Unconstitutional

Hamilton v. Schriro, 73 F.3d 1545 (8th Cir. 1996) (McMillian, J., dissenting)

Keeler v. Mayor of Cumberland, 1996 U.S. Dist. LEXIS 8090 (D.Md. 1996)

In re Tessier, 190 B.R. 396 (Bankr. D. Mont. 1995)

Smith v. Fair Employment and Housing Commission, 913 P.2d 909 (Cal. 1996) (Mosk, J., concurring)

Cases noting but not deciding the constitutional issue

2nd Cir.

Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839 (2nd Cir. 1996)

Mincone v. Nassau County Community College, 932 F. Supp. 598 (E.D.N.Y. 1996)

Alameen v. Coughlin, 892 F. Supp. 440 (E.D.N.Y. 1995)

Davidson v. Coughlin, No. 88 CV 646, 1995 U.S. Dist. LEXIS 19077 (N.D.N.Y. 1995)

Brown v. Keane, 888 F. Supp. 568 (S.D.N.Y. 1995)

Muhammed v. City of New York Dept. of Corrections, 904 F.Supp. 161 (S.D.N.Y. 1995)

Reese v. Coughlin, 93 Div 4748, 1996 U.S. Dist. LEXIS 9206 (S.D.N.Y. 1996)

Bass v. Grottoli, No. 94 Civ 3220 (MGC), 1995 U.S. Dist. LEXIS 13906 (S.D.N.Y. 1995)

3rd Cir.

Abdul-Akbar v. Dept. of Corrections, 910 F. Supp. 986 (D. Del. 1995)

4th Cir.

American Life League v. Reno, 47 F.3d 642 (4th Cir. 1995)

Goodall v. Stafford County School Bd., 60 F.3d 168 (4th Cir. 1995)

Cochran v. Morris, 74 F.3d 1310 (4th Cir. 1996) (en banc)

5th Cir.

Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995)

6th Cir.

Miller-Bey v. Schultz, No. 94-1583, 1996 U.S. App. LEXIS 6541 (6th Cir. 1996)

Akbar-El v. Wise, No. 94-3808, 1996 U.S. App. LEXIS 2788 (6th Cir. 1996)

Kensu v. Cason, No. 91-CV-300, 1996 U.S. Dist. LEXIS 5468 (W.D. Mich. 1996)

7th Cir.

Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994)

Van Dyke v. Washington, 896 F. Supp. 183 (C.D. Ill. 1995)

Kennedy v. Peters, No. 92 C 20209, 1995 U.S. Dist. LEXIS 2429 (N.D. Ill. 1995)

C.L.U.B. v. City of Chicago, 94 C 615, 1996 U.S. Dist. LEXIS 2230 (N.D. Ill. 1996)

Reimann v. Murphy, 897 F. Supp. 398 (E.D. Wis. 1995)

Haff v. Cooke, 923 F. Supp. 1104 (E.D. Wis. 1996)

George v. Sullivan, 896 F. Supp. 895 (W.D. Wis. 1995)

8th Cir.

United States v. Brown, No. 95-1616, 1995 U.S. App. LEXIS 34750 (8th Cir. 1995)

In re Young, No. 93-2267, 1996 U.S. App. LEXIS 10246 (8th Cir. 1996)

Watson v. Ivester, No. 4:95 CV588 DNN, 1996 U.S. Dist. LEXIS 7128 (E.D. Mo. 1996)

Rust v. Clarke, 883 F. Supp. 1293 (D. Neb. 1995)

9th Cir.

Cheema v. Thompson, 67 F.3d 483 (9th Cir. 1995) (Wiggins, J., dissenting)

Anderson v. Angelone, 86 F.3d 932 (9th Cir. 1996)

10th Cir.

Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996)

Snyder v. Murray City Corp., 902 F. Supp. 1444 (D. Utah 1995)

United States v. Meyers, 606 F. Supp. 1494 (D. Wyo. 1995)

11th Cir.

Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995)

Fawaad v. Jones, 81 F.3d 1084 (11th Cir. 1996)

Grosz v. City of Miami Beach, 82 F.3d 1005 (11th Cir. 1996)

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Tilton v. Marshall, No. 94-1233, 1996 Tex. LEXIS 111 (Tex. 1996)

APPENDIX ITEM B

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MEMORANDUM

TO: Robert A. Butterworth
Attorney General

Harry Singletary
Secretary
Florida Department of Corrections

FROM: Kim Tucker
Deputy General Counsel

DATE: July 19, 1996

RE: Preliminary Results of the RFRA Survey of All States: The Impact of the Religious Freedom Restoration Act on State Correctional Systems

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This is to summarize the preliminary results of the national survey on the impact of the Religious Freedom Restoration Act (RFRA) on state correctional systems.

As you know, RFRA's mandated abandonment of the

constitutional standard for review of free exercise of religion claims in the prison context, enunciated by the U.S. Supreme Court in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), has had a tremendously negative impact in Florida. RFRA has resulted in a significant increase in the number of claims for exemptions from security regulations and requests for special privileges. It has also resulted in an increase in the number of cases brought claiming the right to exemptions under this Act, increased the cost in staff and financial resources to evaluate and litigate such claims, and has required Florida as a State to relitigate claims previously won even under the Eleventh Circuit's pre-*O'Lone* "strict scrutiny" standard. What is most distressing is the nature of the recent prison actions. If anything, the recent RFRA claims are more bogus or bizarre than our previous experience.

At the Spring meeting of the National Association of Attorneys General (NAAG), in Washington, D.C., it became painfully apparent that other states were experiencing similar deleterious consequences from the application of this Act in the prison context. This issue was raised by the Attorney General to both the President and Attorney General Janet Reno. General Reno responded by requesting additional information on the costs and consequences of RFRA in prisons and jails. As a result, we undertook the process of surveying all states, the District of Columbia, and the U.S. Territories and Commonwealths on the impact of RFRA on their correctional systems. Surveys were sent by NAAG to the Attorneys General and Secretary Singletary sent surveys to each of the Directors of correctional systems in the States and Territories, as well as several of the larger jail systems. Pursuant to your direction, I am managing the collection and assessment of the survey responses.

I am pleased to report that of the 56 States and Territories to

which the survey was sent, we have received responses from the Attorneys General and Department of Corrections in 33, so far, and we have been provided assurances from the others that their responses are in progress.

As discussed more fully below, RFRA has had a very significant, and very adverse, impact upon corrections systems in three major ways. First, RFRA has been utilized by racial hate groups and other inmate gangs to insulate their activities from the oversight and control of corrections officials. Second, there has been a tremendous increase in the number of lawsuits and internal demands for "religiously motivated" alterations of prison practices, creating significant burdens on the resources of corrections systems, state attorneys general, and the courts. The enactment of RFRA has resulted in the proliferation of claims for exemptions from prison security regulations and requests for special privileges, grounded in obscure or previously little-known "religions", including: Wicca, Satanism, Odinism, Asartu, and Luciferianism. Third, the enactment of RFRA has been followed by a reduction in the availability of religious programming in some state correctional systems.

Perhaps the most prevalent and disturbing pattern is the use of RFRA by inmate groups to insulate their activities from regulation by prison officials. Inmate groups and gangs have recognized that RFRA's "least restrictive means" test makes it very difficult for corrections officials to restrict activity allegedly motivated by religion and, consequently, have claimed religious status for their groups and religious motivation for their actions. Where previously prison officials successfully prevented gangs from wearing colors or emblems, these same groups now assert the right to wear special clothing or medallions as expressions of religious freedom. Since the federal courts are loathe to challenge the sincerity of religious claims and because it is difficult to

overcome the "least restrictive means" test in the assertion of this type of claim, this is providing inmates an avenue for circumventing the legitimate security concerns of correctional institutions and encouraging the proliferation of gangs in prisons. Like Florida, most states responding to the survey have indicated that this pattern is being employed by racial hate groups, such as the Aryan Nation, as well as street gangs.

A second common and disturbing pattern is a tremendous drain on the resources of state correctional systems, State Attorneys General, and the courts. Most states have reported a significant increase in the number of inmate lawsuits asserting religious claims since the enactment of RFRA. There have been particularly noticeable increases in the States of Arizona and New York. Most lawsuits involve issues settled prior the enactment of RFRA, under the analysis established in *O'Lone*. This mostly redundant litigation requires correctional systems to divert employees from their normal tasks, requires State Attorneys General to devote significant staff to defend, and ties up court dockets across the country, in both state and federal courts.[1]

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[1] Not only has there been a significant increase in the free exercise lawsuits since the enactment of RFRA, conversations with Assistant Attorneys General and staffs of Department of Corrections of other States has indicated that the individual cases are more time consuming and costly than prisoner suits under the previous Constitutional standard. During this year's NAAG Corrections Conference, in Albuquerque, NM, and in a recent NAAG conference call on RFRA, attorneys from several States related that courts are reluctant to dispose of such cases on summary judgment or similar grounds because of factual and legal questions about the religious necessity of the requested "accommodations."

Similarly, most of the responding states have noted significant increases in the number, belligerency, and unusual nature of inmates' internal demands for "religiously motivated" alterations to and exemptions from prison regulations. The large number of those requests, together with RFRA's "least restrictive means" requirement, are resulting in very significant burdens on the already overburdened corrections staffs due to the need to investigate the religious necessity and security impact of each of the growing number of demands.

Finally, and most ironically, the survey indicates that RFRA has actually resulted in a decrease in religious programming for most inmates in some States. The increased demands on staff time, described above, means that prison chaplains have less time to actually deliver religious services. In addition, increased demands for time and space by adherents to such previously obscure "religions" as Satanism, Wicca, Asatru, and Odinism[2] has resulted in less time and space being available for adherents of wide-spread, mainstream religions. Moreover, the increased stridency of inmate demands and doctrinal conflicts between inmates and potential volunteers

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[2] Prior to enactment of RFRA, these "religions" were rare or unheard of in the prison context. The survey indicates, however, that inmate claims of conversion to these "religions" has proliferated since enactment of RFRA. Similarly, RFRA has spawned a surfeit of inmate claims for special privileges and exemptions, allegedly grounded in the Native American religion; however, overwhelming these claims are asserted by inmates with no previous or legitimate claim to tribal affiliation. (e.g. claims of Virginia inmates Randall "Lone Wolf" Mullins and William "Two Eagles" Martin to the right to possess feathers from endangered eagles, despite federal law prohibitions against possession of such feathers by individuals who do not have an identification number from the Bureau of Indian Affairs. Ironically, the Justice Department has intervened in this case on the inmates' behalf.)

has resulted in less programming being available from outside groups, who had previously serviced the inmate populations. Finally, some States have become so frustrated with the difficulties resulting from RFRA that they have eliminated all State-funded religious programming in their prisons.[3]

As the foregoing makes clear, the preliminary results of the RFRA survey are very disturbing. It appears that, as anticipated prior to its enactment, RFRA has had a disruptive effect on the operation and security of the nation's prisons. The actual costs of imposition of this ill-conceived standard on State and local correctional facilities is difficult to calculate, but our survey shows taxpayer money being diverted to serve no public purpose. However, the costs are known to be significant and the risks created to staff and inmate safety are substantially increased. I will advise you further of the progress of the survey as additional results become available.

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[3] The Departments of Corrections in Oklahoma and Colorado have discontinued State-funded Chaplaincy programs. Not all reductions in services to mainstream religions are intentional. For example, officials in Wyoming felt compelled by RFRA to allow a group of "Luciferians" to have an unsupervised service in the prison chapel. In an apparent burst of religious enthusiasm, the Luciferian inmates burned Christian hymnals and Bibles, making the books unavailable for Christian inmates to use, causing substantial smoke damage to the Chapel (thus, making it unavailable for general use by other inmates until repaired), and, obviously, creating a significant safety hazard to the life and safety of all inmates and staff within the institution.

APPENDIX ITEM C

July 17, 1996

Ms. Betty D. Montgomery
Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0581

Re: The Effect of the Religious Freedom Restoration Act of 1993 on the Delivery of Religious Services in Ohio's Prisons

Dear Attorney General Montgomery,

We are writing as the Directors of Religious Services of the Ohio Department of Rehabilitation and Correction to describe the effect of the Religious Freedom Restoration Act of 1993 ("RFRA") on the delivery of religious services in Ohio's prisons. Ironically, RFRA has adversely affected the delivery of such services by limiting both the quantity and quality of staff time that can be devoted to religious matters.

Quantitatively, RFRA has forced religious services personnel to be diverted from tasks necessary to meet the spiritual needs of Ohio's inmates in order to respond to the significant legal and operational problems that have followed its enactment. Prior to RFRA, the Ohio Department of Rehabilitation and Correction ("ODRC") took a proactive approach to meeting the religious needs of inmates and we spent the vast majority of our time developing programming, recruiting and working with paid and volunteer providers of

religious services and working with the religious community at large regarding the needs of inmates. We were seldom involved in litigation or problems of statutory compliance.

Unfortunately, that changed dramatically after the enactment of RFRA. We now spend approximately 75 to 90 percent of our time dealing with legal and operational problems directly related to RFRA. More specifically, we spend between 15 to 25 percent of our time working with attorneys from your office on lawsuits arising under RFRA. In addition, we spend between 60 to 70 percent of our time consulting with institutional staff regarding compliance with RFRA. The cumulative result of those developments has been that we are now forced to take a reactive approach to religious matters, as opposed to our traditionally proactive approach.

That dramatic change has two interrelated causes. The first is that RFRA's least restrictive means test requires us to effectively "set up and shoot down" all possible alternatives for dealing with "religiously motivated" requests for alterations of normal prison operations. Considering and evaluating those mostly unworkable alternatives is tremendously time consuming. Time spent on those matters cannot be spent on facilitating the delivery of religious services of a non-disruptive nature.

Secondly, inmates and inmate groups have recognized, and abused, the fact that RFRA has shifted the burden of proof in religious matters. Since RFRA's enactment we have seen the proliferation of new, inmate created "religions" with such bizarre demands as group martial arts classes. In addition, we have seen a very large increase in requests for accommodations for previously unrecognized "requirements" of existing religions. Even more frighteningly, a number of inmate gangs, including racial hate groups, have claimed

"religious" status in order to insulate their illicit and disruptive activities from scrutiny by correctional staff. Although most abuses are ultimately detected and dealt with, that only occurs after a tremendous investment of time by religious services staff who must investigate the "religious" nature of the groups or faiths at issue and the "religious" basis for the individual accommodations requested. Once again, time spent on such tasks cannot be spent on the actual delivery of the services to inmates adhering to unquestionably legitimate and sincerely held religious beliefs.

Not only is that division of resources very disruptive, it is also very wasteful. Most of the accommodations sought involve matters that were analyzed and rejected under Pre-RFRA legal standards. However, R.F.R.A. has required that those matters be revisited, effectively requiring that each problem be analyzed twice. Once again, time spent on those largely redundant tasks is time that cannot be spent on the delivery of religious services that are not subject to any dispute.

The effect of RFRA on the quality of staff time devoted to delivery of religious services has been equally, if not more, deleterious. Prior to the enactment of RFRA religious services personnel were usually able to maintain a "pastoral" type of relationship with individual inmates, regardless of the faith of the individual staff member or inmate. However, because of the increased number of increasingly bizarre demands and the increasing militancy of inmates making such demands, religious services staff are becoming more skeptical, thereby straining the relationship from the perspective of the staff members. Similarly, because staff are increasingly required to demand proof of the religious basis for requested accommodations and frequently forced to deny requested accommodations inmates are beginning to view religious services personnel more as "enforcers" of

staff authority than as pastors. That hardly fosters the type of open, mutually accepting relationship that is vital to the effective delivery of religious services.

As the foregoing makes clear, RFRA has had a very significant and very adverse effect on the delivery of religious services in Ohio's prisons.

Sincerely,

Marloe Karlen
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David Schwarz
Director of Religious Service
South Region
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